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Supreme Court of the United States

OCTOBER TERM, 1947

No. 434

ETTA S. ASBELL, PETITIONER,

versus

THE MUTUAL LIFE INSURANCE COMPANY OF
NEW YORK, RESPONDENT

No. 435

ETTA S. ASBELL, PETITIONER,

versus

THE TRAVELERS PROTECTIVE ASSOCIATION OF
AMERICA, RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI

JURISDICTION

It is respectfully submitted that this Honorable Court should not entertain the Petition herein for the following reasons:

1. The Circuit Court of Appeals properly ruled that it is the right and duty of the Trial Court to determine whether there is any evidence "upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." The Appellate Court properly applied such rule, and reached the only

reasonable conclusion. This is not violative of the Seventh Amendment of the Constitution.

2. The decision of the Circuit Court of Appeals does not furnish grounds for review on a writ of *certiorari* within the letter or spirit of Rule 38, Section 5, of the Rules of this Honorable Court.

STATEMENT

Respondents are in substantial agreement with the Statement supplied by Petitioner as "Summary Statement of the Matter Involved", but in a number of particulars, including the following, the Statement of Petitioner is deemed inaccurate and incomplete.

Such Statement (Petition, page 3) inverts the pertinent clause of the Constitution of the Travelers Protective Association, and omits the proviso. Correctly, these should read:

"Whenever a Class A member in good standing shall through external, violent and accidental means, under the limitations and provisions of the Constitution and amendments thereto, receive bodily injuries which shall independently of all other causes, result in death within six months from the date of said accident, \$5,000.00 shall be paid to the beneficiary named in the certificate of such deceased Class A member."

* * * * *

Provided: * * * "that the Association shall not be liable in case of death when caused wholly or in part by bodily or mental infirmity or disease."

The defense asserted in both cases was in substance that defendants were relieved of liability because disease or bodily infirmity **caused** or **contributed to** Mr. Asbell's death, which, accordingly, was not within the coverage of

the respective insuring clauses, and was also expressly excluded by their exceptions.

It is correct that respondents relied upon the testimony of Dr. Madden to prove the occurrence of Asbell's heart attacks of 1942 and 1945, because he was the physician in attendance who observed, diagnosed and treated this condition. But as establishing, beyond reasonable doubt, that the accident did not of itself produce injuries sufficient to cause death, and that death would have ensued only by reason of the pre-existing condition of Asbell's coronary arteries and heart, favorable to a further heart attack, respondents rely upon testimony given by Drs. Brunson, Epting, Josey, and Madden, as is hereinafter developed, and upon the documentary evidence (R. 24-26); certainly not upon the testimony of Dr. Madden alone.

Nor does the Summary Statement fully set forth (Petition, p. 4) the ground of Respondent's defense, here succinctly stated: " * * * the death of insured was caused or contributed to by disease, and was not attributable to accident, independently and exclusively of all other causes."

Respondents respectfully point to the record (R. 4 and 5) as establishing conclusively the grounds of their motions for directed verdicts. Petitioner's statement thereabout too narrowly relates them.

Neither Petitioner on the one hand nor Respondent on the other took exception to the Trial Judge's charge. In effect he construed the respective insuring provisions and exceptions as meaning what they clearly say. Reference is made to the Reporter's transcript for the charge in its entirety.

When, upon appeal by the Respondents here, as Appellants there, the Circuit Court sifted the evidence with

the scrupulous care reflected by its opinion (R. 64-67), it could find none sufficient to justify submission of the issue to the jury, and upon petition for rehearing, urging the errors Petitioner is again asserting, the Court adhered to its conclusion (R. 85).

It is the decision of that Court, painstakingly reached, and reconsidered, that Petitioner seeks to reverse.

SUMMARY OF ARGUMENT

I. Analysis and refutation of the Petition and supporting Brief.

II. Jurisdiction should not be entertained by this Honorable Court, because:

(1) The Circuit Court of Appeals properly examined the evidence and drew the only reasonable inference to be derived therefrom. Right to trial by jury was not thereby violated.

(2) The decision of the Circuit Court of Appeals does not furnish grounds for review on a writ of *certiorari*.

ARGUMENT

I

Analysis and Refutation of the Petition and Supporting Brief

Under "Questions Presented" the Petition sets forth in substance the following specifications of error by the Circuit Court of Appeals:

1. The Court misconstrued and disregarded substantial conflicts in the evidence.

2. The Court erred in according credence to the opinion of physicians in conflict with the decisions of:

(a) U. S. Supreme Court;

(b) Circuit Court of Appeals for the first, seventh, and tenth circuits;

(c) The Circuit Court of Appeals for the fourth circuit; and

(d) Certain cases pertaining to Workmen's Compensation decided by the South Carolina Supreme Court.

As to the first question, we say that the Court did not misconstrue the evidence of the medical witnesses as Petitioner would have this Court believe, and we reserve argument on this point in discussing Point 1 of Petitioner's Argument *infra*.

As to the second question, we say that despite the diversionary language employed by Petitioner, it is her basic contention that the Circuit Court of Appeals itself "indolently accepted" the opinion of the physicians; whereas, it is the Respondents' submission that the Circuit Court of Appeals properly accepted the opinion of physicians concerning "a matter of science or specialized art of which a layman can have no knowledge", and that, considering the testimony as a whole, there was no substantial conflict as to any material point, and the Court properly determined that only one reasonable inference could be drawn from the testimony.

As to the subdivisions of this section, it is the position of Respondents, as hereinafter set forth in detail, that the decision of the Circuit Court of Appeals is in entire harmony with:

- (a) The decisions of this Court;
- (b) The decisions of other circuits; and
- (c) The decisions of this circuit.

The decisions of the South Carolina Supreme Court construing the Workmen's Compensation Act, relied upon by petitioner as controlling on the Circuit Court, have no application whatever, as an entirely different rule of liability is applicable in Workmen's Compensation cases than is established by the provisions of policy contracts, such as those here involved, and their interpretation by the Courts.

Evidence that was given in the cases last mentioned cannot supply the omission or lack of such testimony on the trial of the instant cases.

In opposition to the "reasons relied on for the allowance of the writ" by Petitioner, Respondents assert that the decision of the Circuit Court of Appeals herein presents no questions of national or judicial importance, that the opinion is free from error, and that the asseveration by Petitioner that the decision will cause confusion is without foundation.

As to Petitioner's Statement of the Evidence

Basically, we believe the essence of the testimony given by the lay witnesses, as detailed by Petitioner, can be very much condensed and summarized as follows:

Mr. Joe W. Jones and Postmaster L. T. Boatwright:
Insured had a hard fall.

Mrs. Asbell:

Insured was in the hospital from January 3, 1942, to January 14, 1942. He was active and vigorous at all other

times, slept well, did not complain, and did not suffer from high blood pressure.

Following the accident insured was operated under anesthetic for two hours and twenty minutes. A week later he was taken home, was not then in normal health and vigor, and appeared to be in shock.

After a trip to Columbia for the purpose of having the cast shortened, insured on the next day (December 29) was taken ill about eleven o'clock and died at six P. M.

Julian H. Scarborough:

"Just didn't believe that he (Mr. Asbell, interpolated) had any heart trouble in 1942."

Commenting now on the lay testimony, Petitioner submits that there is not even a scintilla of testimony contained therein creating an issue as to whether Mr. Asbell had heart trouble in 1942. It would approach absurdity for Petitioner to contend that Mr. Scarborough's statement that he did not believe Asbell had heart trouble in 1942 could create an issue on this point, when weighed against Dr. Madden's positive testimony that Mr. Asbell came under his care on January 3, 1942, at the Columbia Hospital, remaining there until January 17, and that "we made a diagnosis of coronary thrombosis on the history of the patient and the electrocardiogram and his course in the hospital" (R. 15).

Neither does the testimony of the lay witnesses in any wise establish that the fall of insured resulted in injuries sufficient to cause death in opposition to the testimony of Dr. Madden (R. 18, 19) and of Dr. Epting (R. 53), that the injuries received were not sufficient to cause death. These medical witnesses were not testifying hypothetically.

Mr. Asbell was under their care for treatment for the exact conditions concerning which they testified.

Finally, there is no scintilla of testimony given by any of the lay witnesses, we respectfully submit, in opposition to the testimony given by Dr. Madden, Dr. Josey, and Dr. Brunson, that coronary thrombosis was the cause of death, that this was a disease, and that if it was not the sole cause of death, it was at least a contributing cause (R. 15 and 18, R. 21-22, R. 10, 13 and 14).

If, as Petitioner contends, the Circuit Court of Appeals ignored the testimony of the lay witnesses as presenting no conflict with the material testimony touching the points at issue, then we cannot say too forcefully that the Circuit Court of Appeals was entirely right in so doing, as the testimony of lay witnesses should have been so ignored and does not detract in any way from Respondent's contention, unanimously adopted by the Court, that no reasonable inference could be drawn from the testimony other than that the death of insured was caused or contributed to by disease and was not attributable to accident, independently and exclusively of all other causes.

As to the Medical Testimony

Under Point 1 of Petitioner's argument she sets forth in quotation marks the references made by the C. C. A. to Dr. Brunson as the family physician and to Dr. Madden as the doctor "who testified for the defendants with respect to the heart attack in 1942." If the quotation marks are expressive of dissatisfaction of petitioner thereabout, it is perhaps not amiss to call attention to R. 47 where Dr. Brunson, at the suggestion of plaintiff's own counsel testified that he was the Asbell's family physician.

Likewise it may not be amiss to say that as to Dr. Madden the court also described him as "the physician who attended the deceased at the time of the heart attack in 1942, and examined him thereafter" and as "the physician who attended the deceased in 1942" (R. 66).

These things are *trivia*. However, they add to the proof of respondent's contention that petitioner is taking isolated bits of testimony, and seeking to predicate thereon grounds for reversal, when a panoramic view of the testimony as a whole will lead unerringly to the conclusion reached by the Circuit Court of Appeals.

Petitioner next charges that the appellate court "assumes that Dr. Brunson was referring to a thrombosis in 1942. * * * This was a grievous misconstruction which permeates the whole consideration given the evidence below * * *." We have read and re-read second paragraph, R. 65, to which petitioner points, and we cannot warp the clear language of the opinion into even a suggestion upholding this contention of petitioner. We say that the opinion simply does not make the assumption charged, and that it is not the appellate court which has been guilty of grievous misconstruction.

Again we say that it is simply not correct that "Dr. Madden always referred to a thrombosis in January, 1942". The record establishes his references to 1945 as well (R. 47, 48, 54.)

Our discussion of the documentary evidence will be included in the subdivisions which follow.

Testimony of Dr. Brunson

Let it be understood at the outset that Dr. Brunson did not attend Asbell during the heart attack of January,

1942, and did not examine him during that time. Therefore, Dr. Madden's positive testimony, that Asbell did have an attack of coronary thrombosis in 1942 and was under care therefor from January 3 to January 17 of that year and that the diagnosis was made on the history, the condition of the patient, the electrocardiogram and his course in the hospital, is not put in issue by anything Dr. Brunson did say, or could say. Dr. Brunson knew Asbell had gone to Dr. Madden because of pain in his chest, and Dr. Brunson took no exception to the diagnosis (R. 14, R. 11).

As the Circuit Court of Appeals remarked: "Certain portions of the testimony of * * * Drs. Brunson and Madden "when isolated from the rest of their evidence have some tendency to indicate that the deceased had no abnormal heart condition at the time of the accident in 1945" * * * but that the testimony read as a whole compelled the conclusion for which respondent contended.

Hence, petitioner can point to bits of testimony, general in their nature, which when isolated might have some slight tendency to establish issues, but when the full story is told, and the pertinent testimony is examined as a whole, only one reasonable inference can be drawn.

Thus it is with Dr. Brunson (R. 8, R. 9). Although he testified that he did not think that under the circumstances in which death occurred there was present in insured a condition giving rise to the second attack, he **immediately** retracted.

* * * * *

"Q. Doctor, if he had had a perfectly normal heart, is it your opinion that he would have had an attack of coronary thrombosis at that time?

A. No, sir.

Q. You don't think so, do you?

A. No, sir.

Q. Go ahead.

A. What I was going to say, I know that he suffered from shock and weakness and a very severe disability during the time of his illness and I believe that that brought the attack on.

Q. Now we are getting right where I want. You think then, if I understand you correctly, that he did have a condition there that was favorable to an onset of coronary thrombosis given the precipitate events of this accident and the treatment for it?

A. Yes, sir.

Q. And you stick by what you said in the death certificate that the principal cause was coronary thrombosis or occlusion?

A. Yes, sir.

Q. And that is given as the primary cause of death. So if it was not the primary cause of death, Doctor, at least the condition of his heart was certainly a contributory cause of death, was it not?

A. Oh, yes.

Q. So then, Doctor, is it correct, under what you have just said, is it not that this accident did not cause death without the contributing or primary condition of his heart which took him off, that is correct?

A. The two went together.

Q. In other words, the accident all by itself did not cause it without the contributing disease, isn't that correct?

A. I think the accident brought on—In my opinion this accident brought on the attack.

Q. We have got that very clearly in the record. I want to know if you don't say now, what you have in substance just said, that the accident of itself did not exclusively of all other causes cause death but it combined and concurred with or was abetted by his diseased heart?

A. I believe they both were there, yes, sir. (R. 58-65.)"

Further in the death certificate (R. 25) he gave as the principal cause of death "Coronary occlusion or thrombosis".

He gave as a **contributing** cause **not related to the principal cause** the broken arm.

Respondents submit that no reasonable construction can be placed on the answer to question 23 of the death certificate, except to refer it to the "contributing" cause immediately preceding.

This not only accords with the subject-matter of the certificate, and the testimony of Dr. Brunson himself, excerpted above, but with the further certificate of Dr. Brunson comprising Defendant's Exhibit "A" giving the principal cause of death as "Heart attack. Probably coronary occlusion," and **contributory** causes, the fall and fractures. These answers establish non-liability on the part of respondents. Answer 7C (R. 26) removes any lingering doubt, could a doubt possibly remain. The question and answer:

"7C. Was death due directly or indirectly to disease? If so, state disease: Coronary occlusion or thrombosis and accidental injuries."

Doctor Brunson is firmly committed to the proposition that the **disease** of heart was the **principal** cause of death, and that the accident and accidental injuries were **contributing** causes. Even were the facts reversed so that the accidental injuries were the principal cause, and disease a contributory cause there would be no liability upon the respondents under their respective contracts (R. 26-28) and under the clear charge of the Trial Judge.

Thus, respondents say that petitioner mistakenly argues that Dr. Brunson's testimony, taken as a whole, supplies any issue. Not once did he flatly testify that the acci-

dental injuries independently and exclusively of all other causes produced death and death did not result directly or indirectly from disease or bodily infirmity. As has been demonstrated, his testimony is to the contrary.

Addressing our attention finally, under this point, to question and answer 7D, Exhibit A (R. 26), we submit this chronology:

7A—The principal cause of death was heart attack.

7B—A contributory cause of death was the fall and fractures.

7C—Death was due directly or indirectly to the disease of coronary occlusion or thrombosis and accidental injuries.

7D—"If" (death was due directly or indirectly, —interpolated to conform to the preceding question—) "from any cause other than disease, mark cause below and state medical and other facts connected therewith: Accident—Insured slipped and fell on pavement breaking ulna and radius of left arm. He did not recover from effect of injury."

Dr. Brunson had in 7B and 7C given accidental injuries as contributing causes of death. An answer to 7D was accordingly in order—but beyond question the answer refers to the contributory cause of death, not to the principal cause.

For petitioner to contend contrariwise is, we submit, a snatching at straws to add to a house of the same material.

Testimony of Dr. Madden

Petitioner argues that the letter of Dr. Madden (Exhibit 5, R. 24) creates an issue for the jury,—that it would justify a jury in finding that Asbell's heart disease did not contribute as an essential factor in his death.

Considering the letter in the light of Dr. Madden's testimony, no issue is presented. His testimony shows that Mr. Asbell had heart disease in January, 1942; that he had a continuing condition which had given rise to the heart attack; that this condition was a disease; that after the fall and operation Asbell developed pain in his chest and the possibility of a second infarction; and that following a trip by Mr. Asbell to the City of Columbia to have the cast changed, he developed a severe recurrence of symptoms and died the same day.

When the letter said: "Of course, the accident did not in itself cause death", and the other testimony is taken into account that the accident was not of itself sufficient to cause death, and that death was caused by coronary thrombosis, a disease, then is established as a matter of law, we respectfully submit, non-liability on behalf of the respondents.

As to Other Testimony

Under this head petitioner states that Dr. Josey was the only witness who developed the theme adopted by the court—that the thrombosis of 1942 was caused or accompanied by an arteriosclerotic condition which persisted and contributed as an essential factor in the death.

Compare this testimony of Dr. Brunson (R. 10):

"Q. Doctor, as a matter of fact, in virtually 100 per cent of all cases of coronary thrombosis or coronary occlusion you have a hardening of the artery, do you not, that is arteriosclerosis?"

A. Yes, sir, I think you do.

Q. And when that artery hardens it tends to become rough, and make rough the interior surface of that vessel?

A. Yes, sir, it may do that.

Q. And when that occurs in the course of time the blood will clot on that roughened surface, will it not?

A. It does sometimes.

Q. And then that gives you in the typical case an attack of coronary thrombosis or coronary occlusion, that is correct, is it not?

A. Well, it may come that way, yes, sir.

Q. Isn't it an actual fact that in virtually all cases of coronary thrombosis there is present that condition of a hardened artery?

A. Well, sir, I wouldn't say it is in all cases but the probability—

Q. In many, many cases?

A. Yes, sir.

Q. A very large percentage of cases?

A. Yes, sir."

and R. 14:

"Q. And you stick by what you said in the death certificate that the principal cause was coronary thrombosis or occlusion?

A. The two went together."

Compare this testimony of Dr. Madden (R. 15):

"Q. Doctor, please define for us coronary thrombosis and state what condition gives rise to an attack of coronary thrombosis.

A. Coronary thrombosis is an occlusion of the coronary artery, one branch of the coronary arteries or smaller branches, due to the formation of a clot on the wall of the vessel occluding it, stopping that vessel up.

Q. What causes the formation of that clot?

A. It occurs on the basis of an arteriosclerotic condition; plaques of calcareous material, any sclerotic changes in the vessel wall.

Q. Are the vessels normally rough or smooth?

A. Normally the blood vessel is perfectly smooth; a very smooth, shiny endocardium.

Q. Does that permit the blood to flow smoothly by?

A. That is right.

Q. And when you have an arteriosclerotic condition what is the condition of the artery?

A. The wall may be roughened; may be what is known as atheromatous ulcer, which is a breakdown of the inner lining of the vessel where you have just calcareous material on the basis of the ulcer."

and R. 18:

"Q. Doctor, there has been introduced in evidence here a Standard Certificate of Death signed by Doctor Brunson. This of course is a certified copy and not the original, and in that I call attention to the cause of death as given there as coronary occlusion or thrombosis. From your knowledge of Mr. Asbell's history and from your observation and treatment of him, can you state whether or not you have formed an opinion as to the cause of death or can form an opinion as to the cause of death, or whether or not that is the same as given by Doctor Brunson?

A. I think so, sir. I think it will agree with his.

Q. Doctor, I will ask you now whether in your opinion there was any cause or connection between the first attack and the condition that obtained with regard to the coronary artery at the time of the second attack?

A. I think certainly, as I said, that coronary occlusion occurs on a diseased vessel. The thrombosis he had led to a myocardial infarction. That infarction healed—the scar tissue. And that was practically as strong as the heart muscle itself, perfectly well, healed lesion. However, there still was the blood vessel in his heart that was a result of arteriosclerotic process.

Q. An arteriosclerotic condition is a disease?

A. Yes."

It will be observed from the foregoing that Dr. Josey's testimony is corroborative of the testimony given by attending physicians. To say that his is the sole testimony touching the point here under discussion is to ignore the record.

Summarizing the medical evidence: All of the medical witnesses, including Dr. Brunson for the appellee, were agreed that (1) the insured was suffering from a disease of the heart at the time of the fall; (2) the fall did not cause death exclusively of all other causes and without the contributing or primary diseased condition of his heart; (3) the pre-existing heart disease caused or contributed in causing death (R. 13, 14, 18, 20, 53).

The Circuit Court of Appeals accordingly stated with complete accuracy that:

"All the medical witnesses agree that if the deceased had not fallen, he would not have died; and that the fall was not the sole cause of death but that the pre-existing heart condition was at least a contributing factor."

and, as to testimony of Drs. Brunson and Madden, that:

"* * * when the testimony of each of these medical men is read as a whole, it is perfectly clear that each of them held the opinion that in 1945 the deceased was afflicted with an abnormal heart condition which made him more susceptible than a person in normal health to another heart attack, and that in this instance, the defective heart condition was revived by the pain and shock of the fall, so that both physicians came to the conclusion that the death was the result of the combined effect of both causes."

As to Authorities cited by Petitioner

(a) Supreme Court Decisions:

Petitioner laid stress on the case of *Tennant v. Peoria & Pekin Union R. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520. There it was held simply that it is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the

jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. In the instant case the Court did not do what the *Tennant* case says it must not do. On the contrary, and in the absence of substantial evidence in favor of Petitioner, the evidence supporting Respondents' position being uncontradicted, the Circuit Court of Appeals merely determined that there was only one reasonable inference to be drawn from the testimony.

In *Head v. Hargrave*, 105 U. S. 45, 26 L. Ed. 1028, this Court held that a jury was not bound by testimony of experts as to **value**. It said that other persons beside professional men have knowledge of the value of professional services; and that while great weight should be given to the opinions of those familiar with the subject, such opinions should be examined intelligently by the jury in the light of their own general knowledge, and should control only as they were found to be reasonable.

Similarly, in *The Conqueror*, 166 U. S. 110, 132, 17 S. Ct. 510, 41 L. Ed. 937, it was held that as to matters of **value** the jury was not bound by the testimony of experts, on the same theory attributing to the jury, as laymen, knowledge of the subject at issue. It cannot reasonably be said that there is any conflict between the decision in the instant case and the decisions of the Supreme Court cited by Petitioner. As we shall later develop, this Court accords the opinion of experts controlling effect when uncontradicted and when based on facts which sustain them.

(b) Cases from Other Circuits:

A few quotations will serve to illustrate the problem before the Court in *Aetna Life Insurance Company v. Allen* (C. C. A. 1), 32 Fed. (2d) 490:

"The main question before us is whether the insurance company was, on all the evidence, entitled to directed verdicts.

"The lengthy and conflicting views as to 'traumatic endocarditis,' 'traumatic neurosis,' 'ulcerated endocarditis,' 'rheumatic endocarditis,' 'neuritis,' 'psychic shock,' etc., in connection with Dority's progress toward death, may have seemed to the jury to bear little or no relation to the issue of fact submitted to them. * * * There was not even expert agreement as to bacteria being the means or immediate cause of the death. The defendant's leading expert, the medical examiner, testified:

" 'Then, September 12th to 14th started the new picture of the oedema, the swelling of the shoulder and of the hand; that represented, as I have tried to explain, either a delivery of toxins from a focus or a delivery of bacteria. I don't know which.

" 'X-Q. 57. Well, if it was a delivery of bacteria, in your opinion whether or not that was the same bacteria that caused the endocarditis?

" 'A. I am inclined to believe they were, if they were bacteria. On the other hand, I am inclined from recent work, showing the production of toxins by this group, to attribute it probably to the delivery of toxic products, rather than bacteria. The work with reference to this is confusing,' etc.'

"The weight (or lack of weight) of all this theorizing was for the jury."

With conflicting testimony as to the cause of death, one theory establishing coverage under the policy, and the other relieving the insurer, the Court properly held as it did.

It is difficult, if not impossible, to see how the decision in the instant case is at variance with the ruling in the *Allen case*.

In *U. S. v. Gower* (C. C. A. 10), 50 Fed. (2d) 370, the question at issue was whether Gower was totally and permanently disabled. This question is peculiarly one for the jury and tribunals throughout the land recognize that the opinions of physicians alone are not controlling thereabout but the testimony of lay witnesses must also be regarded. Thus it has frequently been held that the opinion of a physician is of no probative value if it is opposed to testimony showing what the claimant can or cannot do. In the *Gower case* the conflicts of testimony are all clearly developed in the opinion, and in fact the Court stated that a conclusion that Gower was not disabled, under the testimony, would be against the greater weight of the evidence.

Coyner v. U. S. (C. C. A. 7), 103 Fed. (2d) 629, also involved the question of whether the evidence of permanent and total disability was sufficient to sustain the verdict of the jury. The Court called attention to the conflicting testimony and also to the fact that determination of the question is dependent on the facts and circumstances of each particular case, citing *Lumbra v. United States*, 290 U. S. 551, 558, 54 S. Ct. 272, 78 L. Ed. 492. The statement was made in the opinion that medical testimony does not in itself decide the issue as to whether there was permanent disability

In the case of *Scanlan v. Metropolitan Life Ins. Co.* (C. C. A. 7), 93 Fed. (2d) 942, it appears that an accident is supposed to have caused the formation of a blood clot in decedent's leg and that this blood clot, in the opinion of the physician, broke; one portion being carried ultimately into the heart and thence to the lung. Two significant facts which were not in dispute, as pointed out by the Court, were that there was no thrombus in the varicose vein or that area before the accident, and that the injury must

have caused the thrombus to form in or near the varicose vein. Where such significant facts are not in dispute, a different rule of law is applicable than that which was given in the charge by the Trial Court in the instant case. Since no exceptions were taken to the Trial Court's charge in this regard, it was recognized by both parties as being correct and the law as charged has now become the law of the instant case.

(c) Cases from the Fourth Circuit:

It is submitted that there is no confusion or conflict created by the decision of the appellate court and the several decisions which it has rendered in other cases cited in Petitioner's Brief.

In *Jefferson Standard Life Insurance Company v. Lighsey* (C. C. A. 4), 49 Fed. (2d) 586, we quote from Judge Soper's opinion two passages clearly indicating the issue of fact there presented:

"A physician was called in on the day after the accident, and found evidence of a blow to the back of the patient's head, and came to the conclusion that he was suffering from a concussion; that the blow was sufficient to cause concussion and death, and was the direct and sole cause of death.

.

"It must be admitted that the evidence produced by the insurance company for the consideration of the jury made out a strong case tending to show that the death of the insured was not due solely to the accident; but on the contrary, there was the evidence of the plaintiff's physician which tended to show that the accident was the sole cause of death, and we are unable to say, after a consideration of the whole case, that only one reasonable inference, and that favorable to

the defendant's contention, could be drawn." (Pages 587, 588.)

Similarly, in *Life Ins. Co. of Va. v. Rhodes* (C. C. A. 4), 71 Fed. (2d) 413, the issue of fact was presented, in the words of Judge Northcott, by this conflict:

"The contention on behalf of the defendant was that diabetes was a contributing cause of his death and that the septicemia resulting from the accident was not the sole cause. On the other hand, there was some evidence on the part of the plaintiff tending to show that the symptoms indicating diabetes were themselves the result of the septicemia caused by the accident. At the conclusion of the evidence, a motion was made on behalf of the defendant for a directed verdict, which motion; the trial judge overruled. The only question here is whether this action of the court below was error." (Page 414.)

In *U S. v. Taylor*, 110 Fed. (2d) 132, the question of total and permanent disability was involved, which as we have pointed out, is determinable by consideration of all evidence, each case resting for its conclusion upon its peculiar facts and circumstances. The Court, after reviewing the evidence, held that a verdict establishing total and permanent disability was warranted.

Surely Petitioner does not urge, merely because the Court in these several cases sifted their peculiar facts and found evidence warranting submission of the issues to the jury, whereas in the instant case the same procedure was adopted and under the facts no substantial evidence was found warranting a jury verdict, that the instant case conflicts with those in the first category.

(d) As to South Carolina Compensation Cases:

A rule of liability obtains with reference to South Carolina Workmen's Compensation cases different from the contractual liability assumed by the Respondents under their insuring agreements and as properly construed by the Trial Judge.

By rule of decision South Carolina Courts are committed in Workmen's Compensation cases, to the proposition that if an employee sustains an accident, arising out of and in the course of his employment, and such injury aggravates or "lightens up" the effects of an existing condition, then the employer becomes liable for payment of compensation for the entire disability, *Cole v. State Highway Department*, 190 S. C. 143, 2 S. E. (2d) 490; *Green v. Bennettsville*, 197 S. C. 313, 15 S. E. (2d) 334; *Westbury v. Heslep & Thomason Company*, 199 S. C. 124, 18 S. E. (2d) 668; *Buggs v. United States Rubber Company*, 201 S. C. 281, 22 S. E. (2d) 881.

Even so, we call attention to the evidence in the *Buggs case, supra*, given by a heart specialist to the effect that the **accidental injury caused thrombosis**, and that this was rare.

In the case of *Westbury v. Heslep & Thomason Company, supra*, a medical witness testified that: "**In his opinion the injury described by the witness as having been received by Mr. Westbury could cause his death.**"

The Respondents urge that Petitioner cannot supply any deficiency of proof herein by reference to other cases where proof of a particular fact may have been adduced. The subject is not one of which the Court takes judicial cognizance.

II

Jurisdiction Should Not Be Entertained

(1) The Circuit Court of Appeals properly examined the evidence and drew the only reasonable inferences to be derived therefrom. Right to trial by jury is not thereby violated.

It is needless to add authorities to those cited by the Appellate Court supporting the rule that a scintilla of evidence is not enough to require the submission of an issue to the jury, and that there is a preliminary question for the judge, before evidence is left to a jury, whether there is any evidence upon which the jury can properly proceed to find a verdict. The statement of the rule was lifted from this Court's opinion in *Gunning v. Cooley*, 281 U. S., 90, 94, 50 S. Ct. 231, 74 L. Ed. 720, and is supported by *Improvement Company v. Munson*, 14 Wall. 442, 448; *Pleasants v. Fant*, 22 Wall. 116, 122. Attention was also called to *Galloway v. United States*, 319 U. S. 372, 389, 87 L. Ed. 1458, 63 S. Ct. 1077, rehearing denied, 320 U. S. 214, 87 L. Ed. 1851, 63 S. Ct. 1443; *Hartman v. Baltimore & Ohio R. Co.* (4 Cir.), 89 Fed. (2d) 425-426.

It cannot be doubted that this is the proper rule, and that it is not within the Erie Railroad doctrine, but is a matter of Federal practice.

We have hereinabove reviewed the evidence, and have fully demonstrated, we believe, that there was no substantial basis for submission of the case to the jury.

We have likewise demonstrated, we believe, in our review of Petitioner's authorities, that the opinions of **attending physicians, not contradicted**, and touching the diagnosis, condition and treatment of a patient, are con-

clusive. These are matters "of science or specialized art of which a layman can have no knowledge." (Petitioner's Supporting Brief, p. 33.)

The testimony of the physicians was not "opposed to actual facts." The presence of heart disease in 1942 and again in 1945 was detected by electrocardiogram. The several diagnoses were based thereon, and upon observation and examination of the patient.

The Seventh Amendment:

"permits expert opinion to have the force of fact when based on facts which sustain it." *Galloway v. United States*, 63 S. Ct. 1443, 320 U. S. 214, 87 L. Ed. 1851.

The case just cited also recognizes and rules that the Seventh Amendment does not deprive federal courts of power to direct verdicts for insufficiency of evidence.

(2) The decision of the Circuit Court of Appeals supplies no adequate grounds for review by certiorari.

Although the petition makes plenary charges of conflict and confusion, it is Respondents' submission that these charges are without foundation.

Petitioner's rights under the Seventh Amendment have not been violated, under authority of the *Galloway case*, *supra*.

The *Tennant case*, as above reviewed, precludes speculation by the Court, when facts are present justifying a verdict.

The cases from other circuits, upon examination, are found to present different factual situations, warranting different conclusions and hence no conflict therewith is presented by the opinion here under attack.

Again, the decisions from the 4th Circuit are shown to be in harmony, for the Court in the *Lightsey* and *Rhodes* cases, *supra*, applied the same rule as here, and determined that under the facts peculiar to each of those cases, jury issues were presented.

Finally, it has been shown that the South Carolina Compensation Cases relate to a different basis or rule of liability than that for which the Respondents have contracted here, and hence are not of any value to Petitioner.

In the light of the foregoing a reading of rule 38 of the Supreme Court, and more particularly of Section 5(b) will lead to the conclusion that "special and important reasons" do not here exist for the granting of the writ of *certiorari*.

The decision, whether from the standpoint of result or precedent, is isolated, and is not of national or judicial significance. It is not probable that the facts will again be duplicated, and basically Petitioner is asking this Court to weigh the facts. Time and again this Court has ruled that granting of the writ is not warranted merely to review the evidence or inferences drawn from it. To cite a few instances:

General Talking Pictures Corporation v. Western Electric Company, Inc., 304 U. S. 175, 546, 58 S. Ct. 849, 82 L. Ed. 1273;

United States v. Johnston, 268 U. S. 220, 45 S. Ct. 496, 69 L. Ed. 925;

Southern Power Co. v. North Carolina Public Service Co. et al., 263 U. S. 508, 44 S. Ct. 164, 68 L. Ed. 413;

Houston Oil Company of Texas v. Cornelia G. Goodrich et al., 245 U. S. 440, 38 S. Ct. 140, 62 L. Ed. 385.

CONCLUSION

In conclusion Respondents urge that the decision of the Circuit Court of Appeals followed Constitutional and accepted procedure and arrived at the only reasonable conclusion authorized by the evidence; that the decision does not create conflicts or confusion, but clearly and correctly applies the law to the facts established by the evidence; and that accordingly the petition for writs of *certiorari* should be denied.

Respectfully submitted,

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